IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 796 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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VINODBHAI MAGANBHAI VAGHRI

Versus

STATE OF GUJARAT

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Appearance:

1. Criminal Appeal No. 796 of 2002
MR BS SUPEHIA for Petitioner No. 1
THROUGH JAIL for Petitioner No. 1
MR KC SHAH, APP, for Respondent No. 1

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CORAM : MR.JUSTICE D.P.BUCH
and
MR.JUSTICE H.H.MEHTA

Date of decision: 03/05/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE D.P.BUCH)

1. This is an appeal by the appellant-convict above-named under Section 374 of the Code of Criminal Procedure, 1973 in order to challenge the judgment and conviction order dated 23.10.2000 recorded by the learned Sessions Judge, Kheda at Nadiad in Sessions Case No.52 of 2000 under which the learned trial Judge convicted the present appellant for an offence punishable under Section 376 IPC and sentenced him to suffer RI for 10 years. The learned trial Judge further directed the appellant to pay fine of Rs.5000/- and in default of payment of fine, he was required to undergo further RI for 5 months. The learned trial Judge also directed that in case of payment of fine by the present appellant, the said amount be paid to victim Laxmiben by way of compensation.

2. The facts of the case of the prosecution against the appellant before the trial Court may be briefly stated as follows:-

2.1 On 16.12.1999, informant-Savitaben was present at her residence. At about evening hours, it was noticed by her that her son had not come back. It seems that the son was serving at a hand lari selling tea. Since son Ratna had not come back till 8.00 PM on the said evening, Savitaben, the mother of the victim, directed her daughter, Laxmi, the victim, to go and call the said son. In the meantime, before Laxmi could reach there, the son had come back and, therefore, Laxmi could not find her brother at the market place where the brother was working. At that point of time, the present appellant contacted Laxmi, who was then aged about 8 years. The appellant took her to a place behind the market and according to the case of the prosecution, he committed rape on the said girl aged about 8 years behind the said place of market. Thereafter, the appellant went away and Laxmi was found crying on the road. It attracted the notice of one Rajivbhai Naranbhai Exh.36. He enquired about the whereabouts of her residence, and on receiving the details about the address of Laxmi, Rajivbhai took her to her residence; that at that time, Savitaben, the mother of Laxmi, enquired from Laxmi as to why Laxmi had gone behind the market, to which Laxmi told her that she had not gone behind the market but the appellant had taken her there. Savitaben again enquired as to what was done by the appellant, to which Laxmi replied, that the appellant committed rape on her. At that point of time, Savitaben examined the person of Laxmi and found that her private part was bleeding. At that point of time, the

appellant was just outside the house as he was staying in the neighbourhood of Savitaben. It has come on record that Savitaben had enquired from the appellant also but the appellant had told her that if he had brought Laxmi there then there would have been some difficulty and, therefore, he did not bring her. This happened just before the arrival of Laxmi with the help of Rajivbhai.

2.2 In view of the above position, informant-Savitaben took Laxmi to the residence of the appellant in the company of her son Ratna and the person of Laxmi was shown to the members of the family of the appellant; That at that point of time, the appellant threatened Savitaben and, therefore, the informant went to the police station and filed her FIR at the said police station. Thereafter, the victim was taken to the hospital for medical examination and treatment. On the basis of the said FIR, the appellant was arrested; investigation was undertaken; muddamal was seized; statements of witnesses were recorded; medical certificates were also obtained from the Medical Officer. At the end of investigation, the concerned Police officer filed chargesheet against the appellant for the offence punishable under Section 376 IPC.

3. Since the offence was triable by a Court of Sessions, the Court concerned committed the case to the Court of Sessions. There the appellant was provided with copies of police investigation papers. The charge was framed and it was read over and explained to the appellant. The appellant pleaded not guilty to the said charge and, therefore, evidence was recorded.

4. As soon as the evidence was over, the learned trial Judge recorded further statement of the appellant under Section 313 of the said Code. Thereafter, the trial Court found the appellant guilty for the aforesaid offence and after hearing the appellant and his learned advocate on the point of quantum of sentence, the trial Court inflicted the aforesaid punishment on the appellant.

5. Feeling aggrieved by the said judgment and conviction order of the trial Court, the appellant has preferred this appeal before this Court.

6. The appellant has contended before this Court that there was no material before the trial Court to hold the appellant guilty; that the evidence on record was contradictory and the presence of Rajivbhai was not satisfactorily explained; that on the whole, the judgment

and conviction order are illegal and erroneous and deserves to be set aside. The appellant has, therefore, prayed that the present appeal be allowed; the judgment and conviction order be set aside; the appellant be held not guilty for the aforesaid offence and be acquitted of the said offence outright. In the alternative, it has been prayed that the sentence inflicted is very high and harsh and, therefore, if the conviction is upheld then the sentence may be reduced.

7. As soon as the appeal was received, it was taken up for admission hearing. The record and proceedings were called and on receiving the record and proceedings, we heard Mr BS Supehia on behalf of the appellant whereas the matter was represented on behalf of the State by Mr KC Shah learned Addl. Public Prosecutor. It is required to be noted that during the course of hearing, the learned advocate for the appellant and the learned APP for the State have taken us through the oral and documentary evidence on record as well as through the observations made by the trial Court and the findings and reasonings recorded by the said Court for finding the appellant guilty. Therefore, the matter was heard finally at the admission stage after calling for the record and proceedings of the trial Court and after going through the same.

8. So far as the evidence is concerned, the prosecution has examined the following witnesses:-

PW 1 Savitaben Ranchhodbhai Exh.7- the mother
PW 2 Laxmiben Ramabhai Exh.8 - the victim
PW 3 Dr Smrutiben Exh.14
PW 4 Dr Satishbhai Exh.24
PW 5 Melabhai Shanabhai Exh.27- the panch witness
PW 6 Gulabsing Natversinh Exh.30- the panch witness
PW 7 Kalubha Amarsinh Exh.32- the panch witness
PW 8 Rajivkumar Naranbhai Exh.36
PW 9 Mumtazben Vora Exh.37- woman police constable
PW 10 PSI Kanjibhai Acharya Exh.38- investigating officer

9. The prosecution has also produced on record certain documents and the said documents have been proved by the concerned witnesses. In fact, following documents are found on record:-

(i) police yadi sent to the Medical Officer at Exh.15;

(ii) examination report of the victim of rape prepared by the Medical Officer Exh.16;

(iii) case papers Exh.17;

(iv) blood requisition form Exh.18 ;

(v) x-ray report Exh.19;

(vi) police yadi for examination of the appellant Exh.25;

(vii) examination report of the appellant Exh.26;

(viii) panchnama Exh.28 and 29;

(ix) panchnama regarding the scene of offence Exh.31;

(x) panchnama about recovery of muddamal clothes of the victim Exh.33;

(xi) FIR filed by the mother and proved through the evidence of mother as well as the concerned Police Officer at Exh.39;

(xii) communication to the FSL Exh.40;

(xiii) letter of FSL Exh.41;

(xiv) report of the FSL Exh.42 and 43;

10. If we go through the evidence on record, we find that the first witness is Savitaben Ranchhodbhai Exh.7, who is the mother of the victim. She has clearly deposed before the trial Court that her husband was not keeping good health and, therefore, he was at home; that her son was working at a tea lari and on the date of the event, the son had not come back from the said place till 8.00 PM and, therefore, she directed her daughter Laxmi, the victim, to go and call her son. Therefore, Laxmi went to the said place. In the meantime, the son had returned home but Laxmi did not. At that point of time, the appellant was found outside her residence and thereafter Laxmi was brought and on enquiry from Laxmi, it was found that the appellant had committed rape on her. Therefore, she had gone to the house of the appellant as the appellant had run away from her house. At the house of the appellant, the appellant threatened Savitaben and, therefore, Savitaben decided to file FIR against the appellant. In the meantime, when she made enquiry from

Laxmi, it was learnt that the appellant had committed rape on her behind the market area.

11. This clearly shows that the victim had disclosed the fact of commission of rape by the appellant on her within a very short span of the act in question. It is more so when the appellant was present there just outside the house of Savitaben. It is also required to be considered that the said fact was disclosed in presence of Rajivbhai who had brought Laxmi there. It is also required to be noted that Savitaben was not a witness to the event as the event had taken place behind the market at some distance from the residence of Savitaben and Savitaben was at her home at all points of time. However, Savitaben has not posed herself to be an eye-witness to the said incident. Whatever was narrated to her by Laxmi and by Rajivbhai was narrated by her to the police and that was reduced into writing in the form of FIR which has been produced by her at Exh.39.

12. On going through the evidence of this witness, it is found that she was cross-examined also. However, nothing fruitful was derived from the said lengthy cross-examination. She has admitted in her cross-examination that she had not witnessed the incident but she came to know about the same when she was informed about the same by Laxmi and by Rajivbhai. Her evidence appears to be natural and when she has stood the test of cross-examination and when her evidence has not been shaken to any extent, there is no difficulty in relying upon the same.

13. We have gone through the judgment of the trial Court and we find that the trial Court has found it proper to rely upon the evidence of this witness. Looking to the evidence of the witness and looking to the observations of the trial Court, we find that the trial Court cannot be said to have committed any error in accepting the evidence of this witness as a trustworthy witness. It is clear that her evidence inspires confidence and there is no reason to reject her testimony. It is true that Savitaben is the mother of the victim but that would not be sufficient to discard her testimony when it is amply corroborated by her own FIR as well as by the evidence of Laxmi and Rajivbhai.

14. Then there is evidence of victim Laxmiben Ramabhai at Exh.8. The learned Judge first enquired from the witness and then administered oath to her. Therefore, her evidence was recorded on oath. This witness has also given detailed version as to how the

incident took place. She has stated before the trial Court that the appellant took her at a place behind the market and there the appellant removed her knickers and also removed his pant and then committed rape on her. Laxmi has given details as to how and in what manner rape was committed on her by the appellant. It is very important to note that this description has been given by her in her own way and in her own words. It seems that even by gestures and signs also she has clarified her evidence as to what she wanted to convey. She has further stated that she was offered chocolate by the appellant while going to the place behind the market. After all, she was hardly aged about 8 years at the relevant point of time. It is required to be considered that the appellant was known to her and when a person known to the victim had carried her behind the market naturally she would not suspect any bad intention on the part of the appellant and, therefore, if she accompanied the appellant to a place behind the market, it would not be an unnatural act on the part of the victim.

Then she has further stated that after committing the act in question, the appellant got up and had gone away. She has further stated that one Harijan took her to her residence and there she had disclosed the aforesaid event to her mother. It is important to note that she has also stated that when she reached home, the appellant was standing just near her house. Therefore, on that point, her evidence stands corroborated by Savitaben's evidence and the evidence of Savitaben stands corroborated by the evidence of the victim about the presence of the appellant at the said place. It is further deposed by her that she was taken to the police station and thereafter she was taken to the hospital where her examination was carried out. She has also stated that she remained as an indoor patient for about a week or ten days.

15. This witness was cross-examined at length on behalf of the appellant. There she made it clear that the appellant has been staying at a very near place from her residence and, therefore she knew the appellant. An attempt was made to show that the victim could not identify or recognise the appellant on account of darkness. There she has denied the fact. It is required to be considered that when the appellant was staying in the neighbourhood of the victim, there was no difficulty on the part of the victim in identifying or recognising the appellant even if there was some sort of darkness. It is required to be considered that from the main road, the appellant had taken the victim to a place behind the

market and thereafter he committed rape on the victim. Therefore, at that point of time, the victim had sufficient opportunity to see the appellant from a very close distance and, therefore, when the appellant was staying in the neighbourhood of the victim, there was no difficulty on the part of the trial Court in accepting the evidence of the victim on the point of identification of the appellant.

16. In view of the above position and again considering the fact that the appellant was staying in the neighbourhood of the victim and when he was found present near the house at the time when she went to the house in the company of Rajivbhai, even this Court finds no difficulty in relying upon the said version of the victim with respect to the identity of the appellant and with respect to his action at the relevant point of time.

17. An attempt was made on behalf of the defence to show that there was some quarrel between the appellant and the mother of the victim. The witness has clearly denied the said suggestion. It is also required to be considered that a question was put to the mother as to the business of the appellant and the same question was put to the victim. The answer given by both the witnesses is the same. An attempt was also made on behalf of the defence to show that the appellant used to be out for his business for the whole day and used to come back at night hours. At that point of time, Savitaben has clearly deposed that the appellant used to return at evening hours on certain occasions. There is no evidence to show that there used to be quarrel between the appellant and Savitaben very often. Even otherwise, it would be very difficult to accept the defence that the name of the appellant was wrongly involved in a serious offence of an act of rape by the appellant on the victim who is of a tender age of 7 to 8 years.

18. Looking to the evidence given by Laxmi and looking to the answers given by her during her cross-examination, it has to be accepted that even during the cross-examination, her evidence has not been shaken to any extent and, therefore, the trial Court had no difficulty in accepting the evidence of this witness and even this Court is also of the opinion that the evidence of this witness is true, genuine and, hence, acceptable. Even the evidence of this witness inspires confidence. She has denied that it is not true that police had not enquired anything from her and that no such incident had taken place and that she had given the name of the appellant at the instance of her mother. This also shows

that the witness, though aged only 8 years at the relevant point of time, was able to understand the questions and was able to answer those questions put to her.

19. Then there is evidence of FIR Exh.39 which clearly supports the evidence of the said two witnesses. There also it has been disclosed that Savitaben was at her residence and Rajivbhai brought Laxmi to the said place. That at that point of time, the private part of the victim was bleeding and on inquiry, it was conveyed by Rajivbhai to Savitaben that the victim was crying near the market in a lonely place and on enquiry by him she told that the appellant had committed rape on her. So the entire incident was narrated by the victim to Rajivbhai as well as to her mother soon after the commission of the said offence. This shows the conduct on the part of the said witness. Therefore also, the evidence of these two witnesses inspires confidence. The incident took place on 16.12.1999 at about 8.00 PM and the FIR was filed on the very day by Savitaben. This also shows that the FIR was filed very promptly and without any loss of time. This would further suggest that the fact stated in the FIR by Savitaben is a natural story gathered by her on enquiry from Laxmi and Rajivbhai.

20. In that connection, we can consider the evidence of Rajivbhai PW 8 Exh.36, who has clearly deposed before the trial Court that on 16.12.1999 at about 8.00 or 8.30 PM he was on his way to a pan galla for taking pan from a shop near vegetable market; at that point of time and at the said place, he saw Laxmi crying on the road. Therefore, he enquired from her and learnt that she was staying near Zankhli lake and her name was Laxmi. The witness has deposed before the trial Court that Laxmi's private part was bleeding and, therefore, he took her to the said area known as Zankhli lake area. There he entrusted Laxmi to the custody of Savitaben; that the mother enquired from the daughter and she replied that the appellant had committed rape on her behind the vegetable market. Therefore, the evidence given by Savitaben and Laxmi has further been corroborated by the independent witness Rajivbhai Naranbhai Exh.36. It is important to note that the witness has deposed that he never knew the appellant in past. In that view of the matter, when the witness never knew the appellant in the past, he had no reason to falsely implicate the appellant in a serious offence like rape on a girl of tender age.

21. This witness has been cross-examined at length.

However, the evidence of this witness has not been shaken to any extent and the witness has stood the test of cross-examination. It is true that in the cross-examination, the witness has also stated that even the anus of the victim was bleeding but there both the parts of the body of the victim have been included. The fact remains that the private part was bleeding as per the evidence of Savitaben also. Therefore, the evidence of this witness clearly supports the evidence of Savitaben as well as Laxmi. Even with respect to clothes put on by Laxmi at the relevant point of time, his evidence gets support from other materials on record. Therefore, he cannot be said to be a got up or a concocted witness. The witness had no reason to give false evidence against the appellant. He had no reason to support the evidence of Savitaben and her daughter falsely. The trial Court has accepted the evidence of this witness and even the learned advocate for the appellant has totally failed in arguing as to why the evidence of this witness should not be accepted by this Court.

22. Smrutiben is a Medical Officer, who has been examined at Exh.14. She has deposed that Dr Banerjee of the concerned hospital was on maternity leave. Therefore, she was required to give evidence on behalf of Dr Banerjee. In fact, Dr Banerjee was Assistant Officer of Dr Smrutiben Vaishnav Exh.14. On the basis of the papers brought by her, she has given evidence before the trial Court. It has been deposed by her that when the victim was brought to the hospital after 8.00 PM she was reported to be 8 years of age; that at that point of time, her private part was bleeding and she had not changed her clothes and she had not taken bath also. It is further deposed by her that the clothes of the victim were stained with blood and even there was injury on the right hand side of her head. The witness has further deposed that the hymen of the victim was ruptured and there was some cut mark at the beginning of the vaginal part. Then she has given the details of the examination undertaken in respect of the person of the victim. She has also deposed that as per the FSL report spermatozoa were found on the petticoat of the victim and even blood was also found thereon but the group of the blood could not be ascertained. On examination of the person of the victim, the Doctor could notice that the mouth of the vagina of the victim was widened and according to her opinion, it could happen because of the penetration of a male organ. She has further stated that the victim was referred to Radiologist for ascertaining the age of the victim, and on examination of the X-ray of the victim, it

was noticed that the victim could be between the age of 7 to 8 years. She has also deposed that the appellant was brought to the hospital on 19.12.1999 and she was examined by Dr Rajgopalan who had gone to South India for further studies and, therefore, he was not available. Therefore, she has produced and proved the certificate of that Doctor. From the certificate issued by Dr Banerjee, the witness could say that the victim was subjected to forcible intercourse as per her opinion.

23. She was cross-examined at length where she has deposed that she had an occasion to give evidence in two rape cases. She has also stated that she was serving in Karamsad hospital since last six years and out of the said period, she had worked as Assistant Professor for five years and for one year as Associate Professor. She has denied that it was not a case of penetration. The evidence of this witness is supported by police yadi Exh.15 and the certificates Exh.16 and 17. The above evidence clearly supports the evidence of Laxmi about the act of rape on the victim.

24. Then there is evidence of Dr Satish Patel at Exh.24 who was working as Tutor in Forensic department in Karamsad Medical College at the relevant point of time. However, he simply gives evidence to the effect that Dr Rajagopalan was also working with him and the witness has produced the case papers of Dr Rajagopalan with police yadi at Exh.25 and 26.

25. Then there is evidence of Melabhai Shanabhai Exh.27, who is examined as panch witness, and in whose presence the police party and co-panch had gone to the house of the appellant who had produced pant and shirt from the said residence. The panchnama in support thereof has been produced at Exh.28.

26. Then there is evidence of Gulabsing Natversinh Exh.30 who was the panch witness in whose presence the panchnama about the scene of offence Exh.31 was drawn.

27. Kalubha Amarsinh Exh.32 is also a panch witness in whose presence woman constable Mumtaz had produced the clothes of the victim which were seized by the police. The panchnama to that effect was drawn which has been produced by this witness at Exh.33.

28. Mumtazben Sikanderbhai Vora Exh.37 is a woman constable who has deposed that she had accompanied Laxmi to the hospital and the Doctor had handed over the clothes of the victim to her, which she had handed over

to the police station.

29. The next witness is PSI Kanjibhai Acharya who had investigated the offence.

30. From the aforesaid evidence, it becomes very clear that Laxmi is the main witness who had given evidence before the trial Court that rape was committed on her by the appellant. Her evidence, as discussed above, has been amply corroborated by her immediate conduct of narrating the said fact to Rajivbhai. The evidence of Rajivbhai and Laxmiben has been further corroborated by the evidence of Savitaben and her FIR Exh.39. All this evidence stands supported by the evidence of the two Doctors who have produced the medical certificates on record. Therefore, there is a complete chain of evidence and there is direct evidence on record to prove the fact of commission of rape by the appellant on the victim.

31. So far as the age is concerned, ossification test has been carried out and it clearly proves that the girl was hardly 8 years of age at the relevant point of time. This clearly shows that she was below the age of 16 and in the present case there was no question of consent on the part of the victim. Even otherwise the question of consent would be irrelevant when the victim is below the age of 16 years.

32. In above view of the matter, we find that there was ample evidence on record before the trial Court to come to a definite conclusion that it was the appellant and appellant alone who had committed the act of rape on the victim. The evidence of victim, Savitaben and Rajivbhai is consistent and the said evidence corroborates the evidence of one another. The said evidence is further corroborated by medical evidence and the FIR. Considering the inter-link between the evidence on record, we find that there is absolutely no reason to reject the evidence of the aforesaid witnesses and the documents on record of the trial Court. The trial Court has closely scrutinised the entire evidence and has given convincing and cogent reasons for accepting the said evidence on record of the trial Court. We find that there is no reason to reject the testimonies of the said witnesses and there is no reason to discard the oral and documentary evidence on the record of the trial Court. We also find that the reasons given by the trial Court and the findings recorded by the trial Court, on the basis of the said reasonings, are acceptable and the trial Court has not committed any error in appreciation

of evidence on record. On reappreciation of evidence ourselves, we find ourselves to be fully in conformity and in agrement with the findings and reasonings of the trial Court. Even the learned advocate for the appellant was almost unable to state as to why the evidence on record should be discarded.

33. The only point raised by the learned advocate for the appellant is that Savitaben and Laxmi both have referred Rajivbhai as a Harijan person. In fact, there is no evidence on record as to whether or not Rajivbhai is a Harijan. Moreover, no clarification was sought for from the said two witnesses as to why they referred Rajivbhai as a Harijan. Any way, we have, for our satisfaction, even gone through the police investigation papers and we find that the statement of Rajivbhai was recorded as a person who brought the victim to her residence. Therefore, this witness cannot be said to have been introduced at a late stage for the first time, more so, when the statement of Rajivbhai was recorded on 17th, i.e. on the very next day of the commission of the offence. Therefore, the name of Rajivbhai has not been introduced for the first time at the evidence stage. His name was disclosed even in the FIR which was filed at night hours on 16th i.e. the date of commission of the offence itself. Therefore, Rajivbhai cannot be said to have been introduced at a late stage or at the stage of recording evidence for the first time in the Court. Therefore, on that count, the evidence of Savitaben, Laxmi or Rajivbhai cannot be brushed aside.

34. When there is a case of rape on a tender aged girl of 8 years and when her evidence is found to be trustworthy and reliable and when the said evidence is further supported by her immediate conduct of conveying the same to Rajivbhai and her mother and when it is supported by the oral evidence of Rajivbhai and Savitaben as well as by documentary evidence of FIR and medical evidence, then reading the evidence as a whole and considering the said evidence collectively, we find that it was the appellant alone who had committed the offence of rape and we are unable to agree with the argument of the learned advocate for the appellant that the evidence is insufficient.

35. At this stage, the learned advocate for the appellant has alternatively argued that the punishment awarded is too harsh and, therefore, some leniency is required to be shown.

36. Considering the age of the victim, we find that

the punishment awarded by the trial Court cannot be said to be too harsh. When a rape has been committed on a tender age girl of 8 years, it will create a permanent impact and impression on the mind of such a girl, which may permanently affect her adversely. Looking to the age of the girl and looking to the age of the appellant, we find that this is not a fit case for interfering with the quantum of punishment awarded by the trial Court.

37. In above view of the matter, we find that the trial Court was justified in convicting the appellant and sentencing the appellant for the period as has been stated in the operative part of the order of the trial Court. There is no reason to interfere with the judgment and conviction order recorded by the trial Court. Therefore, we dismiss the appeal and confirm the judgment and conviction order recorded by the trial Court.

(D.P. Buch, J)

(H.H. Mehta, J)

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